Supreme Court, U.S.
FILED
JAN 17 2002
CLERK

No. 01-819

In the

Supreme Court of the United States

JOE C. ROWE and wife, SHARON B. ROWE and HOWARD L. PRUITT, JR. and wife, GEORGIA PRUITT,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

BRIEF IN OPPOSITION

ROY COOPER
North Carolina Attorney General
Grayson G. Kelley, *Senior Deputy Attorney General
Reginald L. Watkins, Senior Deputy Attorney General
T. Lane Mallonee, Jr., Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

Attorneys for Respondent

*Counsel of Record

January 17, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. FACTUAL BACKGROUND 2

B. PROCEDURAL HISTORY 3

1. Pleadings 3
2. Issues Hearing 3
3. At Trial 4
4. Appellate Proceedings 5

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 8

I. THIS COURT HAS NO JURISDICTION IN THIS CASE UNDER 28 U.S.C. § 1257(a) 9

A. PETITIONERS HAVE FAILED TO PROPERLY INVOKE THIS COURT'S JURISDICTION UNDER 28 U.S.C. § 1257(a) BY FAILING TO PRESERVE THE QUESTION PRESENTED FOR REVIEW. 10

B. THE DUE PROCESS QUESTION PRESENTED WAS NOT A FINAL DECISION BY THE HIGHEST COURT OF THE STATE 13

II. PETITIONERS HAVE FAILED TO DEMONSTRATE A COMPELLING REASON WHY THE WRIT SHOULD BE GRANTED. 13

A. THE QUESTION DECIDED BY THE NORTH CAROLINA SUPREME COURT IS NOT ONE OF SUCH RECURRING CONSTITUTIONAL SIGNIFICANCE AS TO MERIT REVIEW BY THIS COURT. 14

B. THE DECISION OF THE NORTH CAROLINA SUPREME COURT IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.. 17

III. SUMMARY REVERSAL IS AN EXTRAORDINARY REMEDY NOT WARRANTED IN THIS CASE 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 14

Bauman v. Ross, 167 U.S. 548 (1896) 14,15,18

Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897) 9

Edelman v. California, 344 U.S. 357 (1953) 12

Hartford Life Ins. Co. v. Johnson, 249 U.S. 490 (1919) 11

Kirkman v. State Highway Comm'n, 257 N.C. 428, 127 S.E.2d 107 (1962) 15

Los Angeles County Metro. Trans. Auth. v. Continental Dev. Corp., 941 P.2d 809 (Cal. 1997) 19

Louisville & N.R. Co. v. Woodford, 234 U.S. 46 (1914) 11,12

Lynch v. New York, 293 U.S. 52 (1934) 10

Magnum Import Co. v. Coty, 262 U.S. 159 (1923) 13

McCoy v. Union Elevated Railroad Co.,
247 U.S. 354 (1918) 14,15,16,18,19

McRea v. Marion County, 133 So. 278 (Ala. 1931) 19

Mellon v. O'Neil, 275 U.S. 212 (1927) 10

Mutual Life Ins. Co. v. McGrew,
188 U.S. 291 (1903) 10

National Collegiate Athletic Ass'n v. Smith,
525 U.S. 459, 470 (1999) 13

Olson v. United States, 292 U.S. 246 (1934) 15

Raley v. Ohio, 360 U.S. 423 (1959) 10

Rohr Aircraft Corp. v. County of San Diego,
362 U.S. 628 (1960) 10

Schweiker v. Hansen, 450 U.S. 785 (1981) 20

Searl v. Lake County Sch. Dist.,
133 U.S. 553 (1890) 15

Spies v. Illinois, 123 U.S. 131 (1887) 10

State v. Grundler, 251 N.C. 177,
111 S.E.2d 1 (1959), *cert. denied*,
362 U.S. 917 (1960) 12

State v. King, 342 N.C. 357, 464 S.E.2d 288 (1995) 10

STATUTES

N.C. Const., Art. I, § 19 1

N.C.G.S. § 136-40A-64(b) (2000) 4

N.C.G.S. § 136-112(1) (2000) 4,5

RULES

Sup. Ct. R. 10 (2001) 13

N.C.R. App. P. 10(b)(1)(1999) 12

This page intentionally left blank

CITATIONS TO OPINIONS BELOW

The opinion of the North Carolina Supreme Court, reversing the opinion of the North Carolina Court of Appeals, is reported at 353 N.C. 671, 549 S.E.2d 203 (2001), and is included as Appendix A to the Petition. The opinion of the North Carolina Court of Appeals, including the dissent by Judge Horton, is reported at 138 N.C. App. 329, 531 S.E.2d 836 (2000), and is included as Appendix B to the Petition. Citations herein to those opinions below will be to the corresponding pages in the Appendices to the Petition.

JURISDICTION

The petitioners seek to invoke the jurisdiction of this Court, pursuant to 28 U.S.C. § 1257(a) to review a decision of the North Carolina Supreme Court. As explained below, respondent contends that petitioners have not established this Court's jurisdiction with regard to the specific question they seek to present.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the pertinent portions of the Fifth and Fourteenth Amendments to the United States Constitution and Section 136-112(1) of the North Carolina General Statutes, Pet. at 1, Article 1, Section 19 of the North Carolina Constitution provides:

> No person shall be taken, imprisoned, or disseized of his freehold. liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any

person be subjected to discrimination by the State because of race, color, religion, or national origin.

STATEMENT OF THE CASE

Respondent agrees with petitioners that the facts of this case are relatively simple. However, the procedural history is not, and to the extent that history bears on the question of jurisdiction in this case, it must also be examined.

A. FACTUAL BACKGROUND

Respondent North Carolina Department of Transportation, pursuant to authority set forth in Chapter 136 of the North Carolina General Statutes, initiated this condemnation action in State superior court in Catawba County, North Carolina, to acquire a portion of petitioners' property for a public highway project. The project involved the construction of a new multi-lane highway and interchange to connect U.S. Highway 70/321 with Interstate 40, located less than one-half mile away. The acquisition consisted of 11.411 acres out of an 18.123 acre tract.

At the time of the acquisition, the subject property was undeveloped, except for a few billboards, and had no accessible frontage on any major highway, even though it was visible from and adjacent to Interstate 40. The tract was located behind a newly constructed K-Mart and, although the topography consisted primarily of rolling hills, a deep ravine near the boundary separated it from this adjacent development. The only access to the tract was by means of a dead-end city street which served a few homes and also provided a side entrance to K-Mart.

As a result of the project, the remainder of the subject property now has frontage on the new multi-lane connector to Interstate 40 and on a deeded right-of-way for a planned city

street which, when constructed, will join the connector at a signalized intersection.

B. PROCEDURAL HISTORY

1. Pleadings

In their Answer, Motions and Counterclaim ("Answer") filed in the trial court in response to the condemnation complaint, petitioners asserted that N.C.G.S. § 136-112 was unconstitutional because, to the extent it allowed consideration of *special and general* benefits, it denied them just compensation in violation of Article I, Section 19, of the Constitution of North Carolina ("law of the land" provision); and in violation of Amendment V ("just compensation" provision) and Amendment XIV ("equal protection" and "due process" provisions) to the United States Constitution. Pet. App. at B-23.

2. Issues Hearing

Pursuant to N.C.G.S. § 136-108, a pretrial hearing was held by the trial court to determine all issues other than the amount of just compensation due. In that hearing, their Answer notwithstanding, petitioners brought forth and argued only two bases for their constitutional challenge to N.C.G.S. § 136-112(1).

First, stating that their "constitutional attack on the benefits portion of Chapter 136 . . . is based very simply on this premise," *see* Pet. App. at B-24, they contended there was an equal protection violation because just compensation for partial takings of property in North Carolina could be calculated under two different statutory schemes: one applicable to takings by respondent for highway purposes (N.C.G.S. Chapter 136), and the other applicable in proceedings by private and local public condemnors (N.C.G.S. Chapter 40A). While the difference in fair market values of the subject property before and after the

taking is basic to the calculations under both provisions, the language of Chapter 40A makes no mention of benefits, special or general, but specifically provides that compensation is either the difference in the before and after values, or the fair market value of the part taken, whichever is greater. N.C.G.S. § 136-112(1) (2000); N.C.G.S. § 40A-64(b) (2000).

The only other argument advanced by petitioners at the hearing was that respondent had acted arbitrarily and capriciously in its dealings with them as compared to other nearby landowners on the project.

Contrary to petitioners' assertion in their petition, the trial court did not rule on the constitutional challenges raised in the Answer, but instead denied those specific challenges brought forth and argued at the issues hearing. In so doing the court concluded that petitioners had "failed to present sufficient evidence to support the constitutional issues raised and the relief requested." Pet. App. at B-31. Petitioners did not attempt to immediately appeal the trial court's denial of those constitutional challenges, but proceeded with the jury trial on the issue of just compensation.

3. At Trial

At trial, the jury heard testimony from respondent's experts that the remainder of petitioners' property was so enhanced in value, or benefitted by this project, which created new frontage and access for the tract, that the fair market value of the remaining property after the project exceeded the fair market value of the entire tract before the acquisition. While petitioners' experts agreed that part of the remainder was benefitted by the project, they concluded that the value of the remainder after the project was still considerably less than that of the entire tract before the project, and that compensation in a substantial amount was due petitioners.

The trial judge instructed the jury in accordance with N.C.G.S. § 136-112(1) which provides, in pertinent part:

> Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

The sole issue submitted to the jury was the amount of money petitioners were entitled to recover from respondent as just compensation for the appropriation of a portion of their property for highway purposes. Apparently persuaded by respondent's evidence, the jury concluded that the value of petitioners' remaining property after the project was equal to or greater than the value of the entire tract before the acquisition and, accordingly, returned a verdict in the amount of zero compensation due. North Carolina law does not require a jury to specify whether it found the existence of special benefits, general benefits, or both in arriving at its verdict.

4. Appellate Proceedings

Following the jury trial below, petitioners gave notice of appeal to the North Carolina Court of Appeals. Among the errors assigned, only two related to constitutional questions and both of these raised equal protection claims. They were as follows:

> 3. The Trial Court's denial of Defendants' constitutional defenses on the grounds that G.S. 136-12(1)[sic] violates the equal protection provisions of the United States and North Carolina Constitutions.

> 4. The Trial Court's allowing the Jury to consider the benefit to Defendants' property in making its determination as to damages recoverable by the Defendants for the taking in that this violated Defendants' rights to equal protection under the United States and North Carolina Constitutions.

Pet. App. at B-24. Neither assignment of error implicated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, or the "law of the land" (due process) provision of the North Carolina Constitution.

The North Carolina Court of Appeals initially denied review of these and certain other assignments of error on the procedural ground that a timely appeal had not been taken of the trial court's preliminary orders entered following the issues hearing. However, the court reversed the judgment of the trial court on an unrelated evidentiary error and remanded the case for a new trial. Pet. App. at B-1. Upon discretionary review of the timeliness of appeal issue, which was granted at petitioners' request, the North Carolina Supreme Court held that immediate appeal of the interlocutory orders was not required. The case was remanded to the Court of Appeals for consideration of those issues for which review had previously been denied, including the two specific assignments of error set forth above. Pet. App. at A-1-15

On remand, the North Carolina Court of Appeals, in a divided opinion, found N.C.G.S. § 136-112(1) to be unconstitutional on both due process and equal protection grounds, on its face and as applied to petitioners, to the extent that it allowed consideration of *general* benefits. Pet. App. at B-18-32. Judge Horton dissented and, on appeal, the Supreme Court of North Carolina reversed in a unanimous decision. Pet. App. at A-15.

The North Carolina Supreme Court first noted that it was under the "law of the land" clause (due process) and equal protection provisions of the *North Carolina* Constitution that the Court of Appeals had declared the general benefits provision of N.C.G.S. § 136-112(1) invalid. Pet. App. at A-2-3.

As to the lower court's holding that the statute denied just compensation (due process holding), the Supreme Court agreed with the dissent that no due process claim had been properly raised and preserved for review. The Court specifically noted that respondent had preserved no due process claim under the "law of the land" provision of the North Carolina Constitution, either by argument at trial, assignment of error on appeal, or argument before the Court of Appeals. Pet App. at A-4. Having held that no due process claim was properly before the lower court, and having cited the applicable State procedural rule that was violated, the North Carolina Supreme Court concluded, "[t]hus the Court of Appeals erred in considering the constitutionality of the statute on those grounds, and we disavow their reasoning and reverse their holding." Pet. App. at A-4.

The Court also agreed with Judge Horton that the only constitutional issue properly before the Court of Appeals was petitioners' equal protection claim based on the two different statutory schemes for determining just compensation in partial takings cases under North Carolina law. One of those schemes (N.C.G.S. § 136-112(1)) is applicable to takings by respondent for highway purposes, and the other is applicable in proceedings by private and local public condemnors (N.C.G.S. Chapter 40A).

The North Carolina Supreme Court further agreed with the dissent that N.C.G.S. § 136-112(1) does not violate the equal protection clause of the North Carolina Constitution. Pet. App. at A-3-4. The Court held that N.C.G.S. § 136-112(1) does "not trigger strict scrutiny because it neither classifies on

the basis of a suspect classification nor infringes upon a fundamental right. Furthermore, N.C.G.S. § 136-112(1) satisfies rational-basis scrutiny because there are rational reasons for DOT [respondent] and other condemnors to use different systems to calculate just compensation." Pet. App. at A-5-6. Therefore, the Supreme Court reversed the holding of the Court of Appeals on the equal protection issue as well. Pet. App. at A-15.

From this North Carolina Supreme Court decision, petitioners filed their Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the North Carolina Supreme Court concluded that N.C.G.S. § 136-112(1) was a valid exercise of the legislative power of the North Carolina General Assembly and that if did not violate the Equal Protection Clause of either the United States Constitution or the North Carolina Constitution. Petitioners now ask this Court to consider whether the statute violates the Fifth Amendment to the United States Constitution, an issue which was explicitly stricken from consideration by the North Carolina Supreme Court as not having been properly preserved for review in accordance with State law. Consideration of a constitutional challenge to a state law raised for the first time in a Petition for Certiorari and never addressed or decided by the highest court of the state would be contrary to both the jurisdictional parameters of 28 U.S.C. § 1257(a) and longstanding precedent of this Court.

Nor is the decision of the North Carolina Supreme Court in conflict with decisions of this Court or of significant constitutional importance. Relying on clear precedent, the North Carolina Supreme Court simply concluded that the State's statutory scheme for determining just compensation in highway condemnation cases, including allowing finders of fact to consider general benefits to remaining property, is

constitutionally sound. The fact that various states have elected to establish differing formulas for compensating property owners where property has been taken for public use does not justify the exercise of this Court's jurisdiction. Having concluded that permitting consideration of general benefits does not violate any fundamental right guaranteed to a property owner by the Fourteenth Amendment, this Court has left to the states the legal and policy decisions surrounding a methodology of providing the measure of just compensation necessary to meet State constitutional requirements. The decision of the North Carolina Supreme Court approving the methodology adopted by the North Carolina General Assembly merits no further review by this Court.

I. THIS COURT HAS NO JURISDICTION IN THIS CASE UNDER 28 U.S.C. § 1257(a).

The petitioners contend that the North Carolina Supreme Court, in the context of this State highway condemnation case, has erroneously decided an important federal question, to wit: whether, in awarding just compensation for the taking of a partial tract of property, the Fifth Amendment allows a court to reduce (offset) the award by the value of the general benefits said to accrue to the remainder of the tract as a result of the taking. Pet. at 1. This question however, was neither considered nor decided by that court, and should therefore not be reviewed by this Court.

The Fifth Amendment right to just compensation in condemnation cases is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago,* 166 U.S. 226, 239 (1897). In North Carolina, the rule governing the calculation of just compensation in highway condemnation cases, where only part of a tract is appropriated, as here, is codified in N.C.G.S. § 136-112(1). It allows the finder of fact (the jury) to consider any special or general benefits resulting from the utilization of the part taken for highway purposes.

Consequently, the question which petitioners are seeking to present is, in reality, whether N.C.G.S. § 136-112(1) is unconstitutional on its face because it allows consideration of general benefits. In the context of the facts of this case, this is clearly an attack on due process grounds, and the North Carolina Supreme Court declined to decide that question. Petitioners are thus seeking to present a due process question here that was not decided by the highest court of the State.

A. PETITIONERS HAVE FAILED TO PROPERLY INVOKE THIS COURT'S JURISDICTION UNDER 28 U.S.C. § 1257(a) BY FAILING TO PRESERVE THE QUESTION PRESENTED FOR REVIEW.

This Court has long held that a party seeking to invoke jurisdiction under 28 U.S.C. § 1257(a) first must present the federal question for decision to the highest court of the State having jurisdiction. Further, that court's decision of the federal question must be necessary to the determination of the issue, and the court must actually decide the issue on a judgment which, as rendered, could not have been given without deciding it. *See Mellon v. O'Neil*, 275 U.S. 212, 214 (1927); *Lynch v. New York*, 293 U.S. 52 (1934). A challenge to a state statute as repugnant to the federal constitution, as here, must be explicit and timely. *See Raley v. Ohio*, 360 U.S. 423 (1959); *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628 (1960). The federal right or federal question first must be raised in the trial court, whenever, under State law, the State's highest court refuses to consider questions not previously raised. *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *See also, Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903); *Spies v. Illinois*, 123 U.S. 131 (1887).

Petitioners are correct that a general constitutional challenge to the statutory language of N.C.G.S. § 136-112(1)

was raised as a defense in their Answer. Pet. at 3. However, petitioners are incorrect in their assertion "[t]hat the trial court rejected this federal constitutional challenge." Pet. at 3. At the hearing before the trial court, petitioners abandoned their defense that the statute was unconstitutional on its face and should "be declared null and void." Rather, the sole defense argued was that the statute was unconstitutional because petitioners were treated differently under N.C.G.S. § 136-112(1) than condemnees under N.C.G.S. § 40A-64(b), and thus were deprived of equal protection of the law. Pet. App. at B-23-24. Therefore, petitioners abandoned the due process violation alleged in their Answer and pursued only the equal protection argument before the trial court.

Likewise, on appeal to the Court of Appeals, among the errors assigned, only two related to constitutional questions, and neither implicated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, or the "law of the land" (due process) provision of the North Carolina Constitution. These two assignments of error raised only equal protection claims. Pet. App. at B-24. Thus, the only constitutional question properly before the North Carolina Court of Appeals and the North Carolina Supreme Court was whether the equal protection provisions of the constitutions of the United States and the State of North Carolina are violated by the different damage schemes found in N.C.G.S. §§ 136-112(1) and 40A-64(b). Pet. App. at A-3; B-25. This is clearly not the question which petitioners now ask this Court to review. Pet. at i.

This Court has consistently held that federal questions which were not raised in the trial court and pursued by appeal in accordance with the state's rules of practice and procedure cannot provide the basis for jurisdiction if the state's appellate court refuses to consider the federal question for failure to timely raise it. *See Louisville & N.R. Co. v. Woodford*, 234 U.S. 46 (1914); *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490 (1919).

The North Carolina Rules of Appellate Procedure provide, in pertinent part,

> [i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request . . . stating the specific grounds for the ruling the party desired the court to make . . . . It is also necessary for the complaining party to obtain a ruling upon the party's request.

N.C.R. APP. P. 10(b)(1)(2002).

The North Carolina Supreme Court ruled that because petitioners did not argue a due process claim before the trial court and did not raise the issue as an assignment of error on appeal, they had not complied with the requirements of North Carolina Rule of Appellate Procedure 10(b). No due process claim was properly preserved and, therefore, none was properly before the appellate courts. Pet. App. at A-3-4.

Petitioners, having failed to properly pursue and argue the alleged due process of law violation applicable through the "law of the land" clause of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution, cannot now raise that issue in this Court by challenging the validity of the statute on its face. *See State v. Grundler*, 251 N.C. 177, 111 S.E.2d 1 (1959), *cert. denied*, 362 U.S. 917 (1960); *Edelman v. California*, 344 U.S. 357 (1953); *Louisville & N.R. Co. v. Woodford*, 234 U.S. 46 (1914).

B. THE DUE PROCESS QUESTION PRESENTED WAS NOT A FINAL DECISION BY THE HIGHEST COURT OF THE STATE.

In order to properly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), petitioners must also present a question resulting from a final decision of the state's highest appellate court. The North Carolina Court of Appeals held that the general benefits provision of N.C.G.S. § 136-112(1), on its face and as applied, violates the constitutional requirement of just compensation. Pet. App. at B-18. As noted above, the North Carolina Supreme Court held that this due process question had not been preserved and reversed the Court of Appeals, holding that the court had erroneously decided a constitutional question on grounds that were not properly before it. Pet. App. at A-4. The North Carolina Supreme Court therefore neither addressed nor decided the merits of the due process issue which petitioners now ask this Court to review. This Court has clearly stated that "we do not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

II. PETITIONERS HAVE FAILED TO DEMONSTRATE A COMPELLING REASON WHY THE WRIT SHOULD BE GRANTED.

Review by writ of certiorari will be granted only for compelling reasons. SUP. CT. R. 10 (2001). Under the predecessor to Rule 10, a federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). The phrase "special and important reasons" implies a reach to a problem beyond the academic or the episodic. This is

especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for this Court's long practice of avoiding decision of constitutional issues unless avoidance becomes evasion. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936).

A. THE QUESTION DECIDED BY THE NORTH CAROLINA SUPREME COURT IS NOT ONE OF SUCH RECURRING CONSTITUTIONAL SIGNIFICANCE AS TO MERIT REVIEW BY THIS COURT.

Contrary to petitioners' assertions, there is nothing to suggest that the long standing difference among the states and the federal courts on the question of allowing consideration of general benefits in calculating just compensation is of such significance to constitutional jurisprudence or suddenly of such moment to now demand resolution. Petitioners admit that "the rules about which benefits may be set off against the value of the land taken are usually of ancient vintage" Pet. at 10, and "the 'basic theory' of just compensation has not changed for at least a century" Pet. at 16. Both statements fly in the face of the implication that the North Carolina decision creates or exposes a sharp conflict in constitutional law that must now be resolved.

In fact, for more than one hundred years this Court has recognized that most states and the federal courts do not allow general benefits as an offset; that some states allow general benefits to offset damages to the remainder, but not the value of the land taken; and, that still others, like North Carolina, allow general benefits to offset both. *See Bauman v. Ross*, 167 U.S. 548 (1897) and *McCoy v. Union Elevated Railroad Co.*, 247 U.S. 354 (1918) and the cases cited therein.

Despite this obvious difference in rules, this Court has never sought to impose one uniform rule regarding the type of benefits that can be considered on the states for two reasons. First, the difference between general and special benefits in the context of just compensation has never been held to be of constitutional significance. This is so because "it is the duty of the State to see that compensation is just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl v. Lake County Sch. Dist.*, 133 U.S. 553, 562 (1890). The just compensation required by the Constitution is to be measured by the loss *in value* to the owner, "[t]o award him less would be unjust to him; to award him more would be unjust to the public." *Bauman,* 167 U.S. at 574. "He must be made whole, but is entitled to no more." *Olson v. United States*, 292 U.S. 246, 255 (1934). It is well established that the Fifth Amendment permits the value of land acquired to be fully offset by benefits to the remainder resulting from the highway project, because the owner has sustained no net loss in *value*. *Bauman,* 167 U.S. at 584. If the enhancement in value (benefit) of the remainder is real, not speculative, and is the proximate result of the project, then the owner is made whole even though the benefit is set off against the value of the part of his property that is acquired to build the highway, and the Constitution satisfied. North Carolina law requires that to be considered, benefits "must be actual and appreciable and not merely conjectural and they must be the direct and proximate result of the improvement." *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 434, 126 S.E.2d 107, 112 (1962).

Second, even though most states and the federal courts may believe that it is the *better* rule to allow special but not general benefits as a setoff, that is not the standard this Court applies when the constitutionality of a state's rule is challenged. As was stated in *McCoy*:

> We may examine proceedings in state courts for appropriation of private property to

> public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without just compensation, then due process of law was denied him, contrary to the Fourteenth Amendment. *Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority . . . but with denial of a fundamental right.*

247 U.S. at 363 (citations omitted and emphasis added).

The fundamental right to just compensation is not denied when benefits are considered, no matter if they are dubbed general or special, so long as the condemnee is made whole.

By its decision below, the North Carolina Supreme Court has affirmed that the State of North Carolina, through the enactment of N.C.G.S. § 136-112(1) which allows consideration of general benefits, has struck a proper and constitutional balance between fairness to the property owner and fairness to the public, and affords a compensation that is just to the condemnee because it makes him whole in terms of value. Pet. App. at A-10-11.

Petitioners suggest that allowing consideration of general benefits *often* transforms the constitutional guarantee of just compensation into a rule of no compensation. Pet. at 10. In support of this statement they cite only two cases, both decided more than forty-five years ago. To the contrary, it is the experience of respondent, gained over the course of thousands of highway condemnation cases in this State, that verdicts of zero compensation are extremely rare, and respondent virtually never offers evidence of what would be properly characterized as general rather than special benefits in those proceedings.

In fact, it is the uniqueness of the facts in petitioners' case, not the rules applied, that explains their fate in the trial court. That rare fact situation also explains why their constitutional challenge to the general benefits provision, which has been intact for over one hundred years, was one of first impression in the North Carolina Supreme Court. Pet. App. at A-9. It is extremely rare that remainder property is so clearly specially and directly benefitted by a highway project as here, where the property formerly had no frontage on any major highways, but now the remainder has significant frontage and access on a new, multi-lane connector to a new interstate highway interchange and on a deeded right-of-way for a planned city street which will eventually join the connector at a signalized intersection.

The essence of petitioners' equal protection argument below was only marginally premised upon a distinction between general and special benefits. Petitioners' actual grievance was that under the statute applicable to private condemnors, N.C.G.S. § 40A-64(b), they would have at least received the value of the land acquired; whereas, under N.C.G.S. § 136-112(1) consideration of benefits resulted in the zero verdict. While petitioner may disagree with the policies underlying this method of just compensation, North Carolina's decision to adopt and consistently apply this statutory scheme, as sanctioned by the highest court of the State does not raise issues of federal constitutional significance justifying review by this Court.

B. THE DECISION OF THE NORTH CAROLINA SUPREME COURT IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Two time-tested decisions of this Court are especially pertinent to this issue, not only for what they hold, but also for what they do not hold.

In *Bauman*, this Court examined the various rules adopted by the states regarding the offset of benefits, including those which allow the offset of general benefits, and held:

> The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied.

167 U.S. at 584.

Nowhere in *Bauman*, or in any decision of this Court thereafter, is it stated or remotely suggested that the Fifth Amendment right to just compensation precludes the states from allowing the offset of general benefits, or that the rule that was being adopted in that case regarding benefits (the federal rule) was intended to establish the *minimum* level of compensation that was constitutionally acceptable.

In *McCoy*, this Court again examined the benefits rules in the various jurisdictions which are applicable both where property is taken, and where it is damaged but not taken. The plaintiff there claimed he had been deprived of the value of his property without just compensation in violation of the Fourteenth Amendment where state law allowed general benefits to offset the compensation he would have otherwise received as a result of the construction of an elevated railway adjacent to his property. The Court held:

> The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the value of his property under a rule which makes it impossible for him to obtain just compensation. There is no guarantee that he shall derive a positive

> pecuniary advantage from a public work whenever a neighbor does. It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it – compensation to the owner in that form is permissible. *And we are unable to say that he suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits -- enhancement in market value -- flowing directly from a public work, although all in the neighborhood receive like advantages.* In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

247 U.S. at 365-66 (emphasis added).

The North Carolina Supreme Court cited the italicized portion of the holding in *McCoy* in its decision below in support of the proposition that the Fourteenth Amendment "allows states to empower fact-finders to consider 'general benefits' when calculating just compensation." Pet. App. at A-8. Other states are in accord with this interpretation of *McCoy*. *See McRea v. Marion County*, 133 So. 278, 279 (Ala. 1931); *Los Angeles County Metro. Trans. Auth. v. Continental Dev. Corp.*, 941 P.2d 809, 822 (Cal. 1997). Petitioners contend this is an erroneous application of federal law. They strain to distinguish *McCoy*, contending that because it involved property that was damaged but not taken. The holding has no application where property is actually taken.

In *McCoy*, although it was the *value* of the property that had been taken, this Court applied the same Fourteenth Amendment analysis applicable to a case where property had been taken, citing the same rules in the various states regarding offset of benefits. The same due process right to just

compensation where property is taken was involved. While the Court noted that no property had been taken, there is no suggestion in the opinion that a different rule would apply if an actual loss of property had been involved. Further, the Court noted that the subject was much discussed in *Bauman* and quoted extensively from the holding in that case, including the proclamation that the Fifth Amendment does not prohibit the offset of benefits. Therefore, this Court clearly treated and analyzed *McCoy* as a takings case. The North Carolina Supreme Court thus properly applied *McCoy* in concluding that neither the Fifth nor the Fourteenth Amendment to the United States Constitution precludes a state from allowing fact-finders to consider general benefits when calculating just compensation.

III. SUMMARY REVERSAL IS AN EXTRAORDINARY REMEDY NOT WARRANTED IN THIS CASE.

Summary reversal is clearly not warranted here. Usage and practice suggest that this extraordinary remedy be employed only in the most unusual case. In order for it to be available, the law must be settled and stable, the facts not in dispute, and the decision below clearly in error. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981). Here, petitioners' own arguments make it clear that the law is not settled among the various jurisdictions regarding the offset of general benefits. For the reasons stated above, even if the North Carolina Supreme Court misapplied *McCoy*, which it did not, the result is that the constitutional issue is not settled because petitioners cannot point to a decision of this Court which clearly prohibits the states from setting off general benefits without constitutional peril. Therefore, petitioner cannot establish that the North Carolina Supreme Court's decision was clearly in error or that summary reversal is warranted.

CONCLUSION

For the reasons discussed above, petitioners have failed to identify any issue worthy of this Court's consideration on certiorari. Accordingly, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROY COOPER
Attorney General

Grayson G. Kelley*
Senior Deputy Attorney General

Reginald L. Watkins
Senior Deputy Attorney General

T. Lane Mallonee, Jr.
Special Deputy Attorney General

N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6900

January 17, 2002

**Counsel of Record*